

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

HERVE GURRIER,

Plaintiff,

v.

ROBERT LEGRAND, *et al.*,

Defendants.

3:10-cv-00719-LRH-VPC

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE**

January 4, 2012

This Report and Recommendation is made to the Honorable Larry R. Hicks, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is plaintiff's motion for an emergency injunction, which the court analyzes as a motion for preliminary injunction (#24).¹ Defendant opposed (#25) and plaintiff replied (#26). The court has thoroughly reviewed the record and recommends that plaintiff's motion for preliminary injunction (#24) be denied.

I. HISTORY & PROCEDURAL BACKGROUND

Plaintiff Herve Guerrier ("plaintiff"), a *pro se* inmate, is currently incarcerated at Northern Nevada Correctional Center ("NNCC") in the custody of the Nevada Department of Corrections ("NDOC") (#15). The events giving rise to plaintiff's underlying action took place while plaintiff was housed at Lovelock Correctional Center ("LCC"). *Id.* Pursuant to 42 U.S.C. § 1983, plaintiff brings his amended civil rights complaint, alleging violations of his Eighth and Fourteenth Amendment rights. *Id.* After the court's screening of plaintiff's amended complaint pursuant to 28 U.S.C. § 1915A, his sole remaining claim alleges an Eighth Amendment deliberate indifference claim against defendant John Scott, a senior physician at LCC (#16). *Id.*²

In his complaint, plaintiff alleges that he was diagnosed with an inguinal hernia in 2008

¹ Refers to the court's docket number.

² The court dismissed plaintiff's claims against Katherine Hegge and Robert LeGrand, and all other constitutional claims (#16).

1 (#15, p. 3).³ Plaintiff contends that defendant Scott acknowledged the need for hernia surgery but
2 said “that he will not recommend it because NDOC will not spend tax payers money on inmates to
3 have hernia surgery.” *Id.* at 4. Plaintiff claims that as a result of his untreated hernia, he is unable
4 to stand for an extended period of time without excruciating pain. *Id.* Plaintiff alleges that defendant
5 Scott violated plaintiff’s Eighth Amendment rights when he refused to recommend plaintiff for
6 surgery due to the financial cost of hernia surgery. *Id.* at 6.

7 Plaintiff filed the present motion for injunctive relief on October 11, 2011 (#24). Plaintiff
8 alleges that a surgeon at NNCC examined plaintiff on September 12, 2011, and recommended that
9 plaintiff have hernia surgery. *Id.* at 2-3. Plaintiff claims that there has been a delay in approving the
10 surgeon’s recommendation and “there is no fix time limit [sic] how long it will take” for the review
11 committee to approve the surgeon’s recommendation. *Id.* at 3. In his motion, plaintiff asks the court
12 to order NNCC “to provide plaintiff relief from day to day excruciating hernia pain,” and approve
13 the surgeon’s recommendation for surgery. *Id.*

14 Defendant opposes plaintiff’s motion and argues that plaintiff seeks to enjoin a party that
15 is not a defendant in the underlying lawsuit (#25, p. 4). Defendant states that plaintiff’s motion
16 “impermissibly attempts to broaden the scope of this lawsuit,” and that any preliminary injunctive
17 relief must be tailored to the underlying action against defendant Scott. *Id.* at 4-5. Defendant further
18 asserts that plaintiff fails to meet any of the requirements necessary to obtain injunctive relief.
19 Defendant argues plaintiff is not likely to succeed on the merits of his underlying claim because he
20 does not allege that defendant purposefully ignored plaintiff’s hernia or that defendant disregarded
21 plaintiff’s complaints of pain. *Id.* at 5-6. Defendant contends plaintiff is not likely to suffer
22 irreparable injury absent preliminary injunctive relief because plaintiff “presents no evidence that
23 the surgery was deemed the only medically acceptable treatment and no evidence that the surgery
24 is an emergency.” *Id.* at 8. Defendant argues the balance of hardships favors denying plaintiff’s
25 request because an injunction would require NNCC, a non-party, to assume medical costs that may
26 not be medically necessary. *Id.*

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28 ³

The court utilizes the page numbering produced by the electronic docket numbering system.

1 In reply, plaintiff claims that defendant Scott violated plaintiff's Eighth Amendment rights
 2 when he refused to recommend plaintiff for surgery because of the financial cost of surgery (#26,
 3 pp. 1-2).⁴ Plaintiff further alleges an NNCC surgeon recently examined plaintiff and recommended
 4 hernia surgery. *Id.* at 3. However, plaintiff states NNCC must first approve the surgery
 5 recommendation. *Id.* at 4. Thus, plaintiff seeks an injunction ordering NNCC to approve the
 6 surgeon's recommendation and provide him with medical relief. Plaintiff further claims that many
 7 NDOC inmates with hernia problems are subject to policies that violate their Eighth Amendment
 8 rights. *Id.* at 13. Plaintiff appears to argue that injunctive relief is appropriate because he is
 9 challenging government policies which result in a pattern of constitutional violations. *Id.*

10 The court notes that the plaintiff is proceeding *pro se*. "In civil cases where the plaintiff
 11 appears *pro se*, the court must construe the pleadings liberally and must afford plaintiff the benefit
 12 of any doubt." *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988); *see*
 13 *also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

14 II. DISCUSSION & ANALYSIS

15 A. Discussion

16 1. Preliminary Injunction Standard

17 A preliminary injunction is an "extraordinary and drastic remedy" that is never awarded as
 18 of right. *Munaf v. Geren*, 553 U.S. 674, 688-90 (2008) (citations and quotation omitted). Instead,
 19 in every case, the court "must balance the competing claims of injury and must consider the effect
 20 on each party of the granting or withholding of the requested relief." *Winter v. Natural Resources*
 21 *Defense Council, Inc.*, 555 U.S. 7, 17 (2008) (citation and quotation omitted). The instant motion
 22 requires the court to determine whether plaintiff has established the following: (1) he is likely to
 23 succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief;
 24 (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *Winter*, 555
 25 U.S. at 17 (citations omitted).

26 Before *Winter*, courts in the Ninth Circuit applied an alternative "sliding-scale" test for
 27

28 ⁴ When citing to plaintiff's reply (#26), the court utilizes plaintiff's handwritten numbering
 at the bottom of the page.

1 issuing a preliminary injunction that allowed the movant to offset the weakness of a showing on one
2 factor with the strength of another. *See Alliance for Wild Rockies v. Cottrell*, 632 F.3d. 1045, 1049-
3 50 (9th Cir. 2010); *see also Beardslee v. Woodford*, 395 F.3d 1064, 1067 (9th Cir. 2005). In *Winter*,
4 the Supreme Court did not directly address the continued validity of the Ninth Circuit’s sliding-scale
5 approach to preliminary injunctions. *See Winter*, 555 U.S. 7 at 51 (Ginsburg, J., dissenting)
6 (“[C]ourts have evaluated claims for equitable relief on a ‘sliding scale,’ sometimes awarding relief
7 based on a lower likelihood of harm when the likelihood of success is very high . . . This Court has
8 never rejected that formulation, and I do not believe it does so today.”); *see also Alliance*, 632 F.3d.
9 at 1131. In light of the *Winter* decision, however, the Ninth Circuit determined that the Circuit’s
10 sliding-scale approach, or “serious questions” test “survives . . . when applied as part of the four-
11 element *Winter* test.” *Alliance*, 632 F.3d. at 1131-32. “In other words, ‘serious questions going to
12 the merits’ and a hardship balance that tips sharply toward the plaintiff can support issuance of an
13 injunction, assuming the other two elements of the *Winter* test are also met.” *Id.* The portion of the
14 sliding-scale test that allowed injunctive relief upon the possibility, as opposed to the likelihood, of
15 irreparable injury to the plaintiff, was expressly overruled by *Winter*. *Stormans, Inc. v. Selecky*, 586
16 F.3d 1109, 1127 (9th Cir. 2009).

17 An even more stringent standard is applied where mandatory, as opposed to prohibitory
18 preliminary relief is sought. The Ninth Circuit has noted that although the same general principles
19 inform the court’s analysis, “[w]here a party seeks mandatory preliminary relief that goes well
20 beyond maintaining the status quo *pendente lite*, courts should be extremely cautious about issuing
21 a preliminary injunction.” *Martin v. International Olympic Committee*, 740 F.2d 670, 675 (9th Cir.
22 1984). Thus, an award of mandatory preliminary relief is not to be granted unless both the facts and
23 the law clearly favor the moving party and extreme or very serious damage will result. *See Anderson*
24 *v. United States*, 612 F.2d 1112, 1115 (9th Cir. 1979). “[I]n doubtful cases” a mandatory injunction
25 will not issue. *Id.*

26 Finally, the Prison Litigation Reform Act (“PLRA”) mandates that prisoner litigants must
27 satisfy additional requirements when seeking preliminary injunctive relief against prison
28 officials:

Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief and shall respect the principles of comity set out in paragraph (1)(B) in tailoring any preliminary relief.

18 U.S.C. § 3626(a)(2). Thus, Section 3626(a)(2) limits the court's power to grant preliminary injunctive relief to inmates. *Gilmore v. People of the State of California*, 220 F.3d 987, 998 (9th Cir. 2000). "Section 3626(a) . . . operates simultaneously to restrict the equity jurisdiction of federal courts and to protect the bargaining power of prison administrators – no longer may courts grant or approve relief that binds prison administrators to do more than the constitutional minimum." *Id.* at 999.

B. Analysis

Plaintiff seeks an injunction against an entity which is not named as a party in this lawsuit. Specifically, plaintiff asks this court to order NNCC to "provide plaintiff relief" from his hernia pain, by approving the surgeon's recommendation for surgery. Courts may not rule on the rights of persons not currently before them. *Zepeda v. U.S. Immigration Serv.*, 753 F.2d 719, 727 (9th Cir. 1985) ("A federal court may issue an injunction if it has personal jurisdiction over the parties and subject matter jurisdiction over the claim; it may not attempt to determine the rights of persons not before the court."). As NNCC is not a party to the lawsuit plaintiff filed, the court may not fashion injunctive relief that orders NNCC to provide plaintiff with a particular course of medical treatment. Further, the underlying lawsuit is against defendant Scott, and plaintiff's request for preliminary injunctive relief is not related to defendant Scott's alleged deliberate indifference.

Plaintiff seeks to enjoin conduct that is not related to the underlying lawsuit. Injunctive relief is to be used to address issues related to the underlying violations presented in the complaint. Although the Ninth Circuit has not addressed the issue directly, other circuits have repeatedly held that a plaintiff seeking injunctive relief must show "[a] relationship between the injury claimed in the party's motion and the conduct asserted in the complaint." *Devose v. Herrington*, 42 F.3d 470,

1 471 (8th Cir. 1994); *see Little v. Jones*, 607 F.3d 1245, 1250-51 (10th Cir. 2010); *Colvin v.*
2 *Caruso*, 605 F.3d 282, 299-300 (6th Cir. 2010) (no preliminary injunction where motion for relief
3 was based on facts and circumstances entirely different from initial claim); *Omega World Travel,*
4 *Inc. v. Trans World Airlines*, 111 F.3d 14, 16 (4th Cir. 1997) (same). Further, a court need not
5 consider claims that were not raised in the complaint. *McMichael v. Napa County*, 709 F.2d 1268,
6 1273 n.4 (9th Cir. 1983).

7 While plaintiff discusses his underlying Eighth Amendment claim against defendant Scott
8 in his instant motion, the relief he requests is unrelated to defendant Scott. Plaintiff appears to
9 discuss defendant's alleged misconduct to provide the court with a background to the new claim
10 plaintiff alleges in the instant motion. Plaintiff now asks the court to order NNCC to provide him
11 with relief and approve an NNCC surgeon's recommendation for surgery. Plaintiff's pending
12 lawsuit alleges that defendant Scott was deliberately indifferent to plaintiff's serious medical need
13 when he refused to refer him for hernia surgery (#15). In his motion for injunctive relief, plaintiff
14 alleges that while an NNCC surgeon recommended plaintiff for hernia surgery, "there is no fix time
15 limit [sic] how long it will take" for the review committee to approve the surgeon's
16 recommendation (#24). New complaints are properly lodged using the prison grievance system,
17 and if they remain unresolved, by filing a new action. The court does not have jurisdiction to decide
18 plaintiff's motion for injunctive relief as his motion requests a mandatory injunction against a non-
19 party, and requests relief from conduct which is unrelated to the present lawsuit.

20 Due to these procedural deficiencies, the court will not undertake a full analysis of plaintiff's
21 request for injunctive relief. However, plaintiff fails to address the requirements for injunctive
22 relief in his motion. Plaintiff has not submitted any evidence, other than his own beliefs, to
23 substantiate his allegation that defendant Scott acted with deliberate indifference to plaintiff's
24 serious medical need. Further, plaintiff failed to allege any facts to show that he will face
25 irreparable harm if the court does not intervene. Plaintiff's motion does not warrant interference
26 with NDOC's internal process regarding approval for surgery. Moreover, NNCC is not a party to
27 the lawsuit, and the court cannot determine the rights of a non-party. Therefore, the balance of
28 equities does not favor issuance of an injunction. Finally, it is not in the public interest to order an

1 injunction against NNCC, a non-party, which would require NNCC to expend significant time and
2 resources.

3 The court recommends that plaintiff's motion for injunctive relief (#24) be denied because
4 it seeks injunctive relief against NNCC, an entity that is not a party to this lawsuit, and it is not
5 based upon the claim in the underlying suit. Furthermore, plaintiff did not demonstrate that he is
6 likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of
7 preliminary relief, that the balance of equities tips in his favor, or that an injunction is in the public
8 interest.

9 III. CONCLUSION

10 Based on the foregoing and for good cause appearing, the court recommends that plaintiff's
11 motion for preliminary injunction (#24) be **DENIED**.

12 The parties are advised:

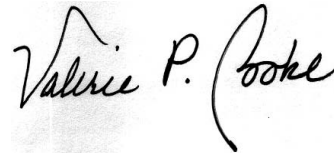
13 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice,
14 the parties may file specific written objections to this Report and Recommendation within fourteen
15 days of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and
16 Recommendation" and should be accompanied by points and authorities for consideration by the
17 District Court.

18 2. This Report and Recommendation is not an appealable order and any notice of appeal
19 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

20 IV. RECOMMENDATION

21 **IT IS THEREFORE RECOMMENDED** that plaintiff's motion for preliminary injunction
22 (#24) be **DENIED**.

23 **DATED:** January 4, 2012.



24 **UNITED STATES MAGISTRATE JUDGE**